

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75 - 1109 B

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

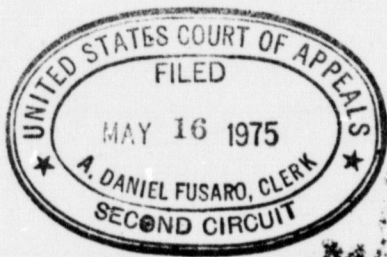
Docket No. 75-1109

ADOLPHO RIVERA,

Appellant.

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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TABLE OF CONTENTS

Table of Cases and Statutes Cited	ii
Questions Presented	1
Statement Pursuant to Rule 28(a)(3)	
Preliminary Statement	2
Statement of Facts	3
A. The Trial	4
B. The Charge to the Jury	7
Argument	
I Counts Two and Three, which charged appellant and Fontanez with assaulting Castillo with intent to steal money, must be dismissed because they cannot be sustained under either 18 U.S.C. §2114 or 18 U.S.C. §2112	10
II The District Court's improper charge allowed the jury to find appellant guilty on an erroneous theory of vicarious liability	15
Conclusion	17

TABLE OF CASES

<u>Glasser v. United States</u> , 315 U.S. 60 (1942)	14
<u>Leary v. United States</u> , 395 U.S. 56 (1969)	16
<u>United States v. Dickerson</u> , 508 F.2d 1216 (2d Cir. 1975) ..	16
<u>United States v. Gallishaw</u> , 428 F.2d 760 (2d Cir. 1970) ...	16
<u>United States v. Howell</u> , 447 F.2d 1114 (2d Cir. 1971)	16
<u>United States v. Peoni</u> , 100 F.2d 401 (2d Cir. 1938)	14
<u>United States v. Reid et al.</u> , Doc. No. 74-2598/2599, slip op. 3073 (2d Cir., April 24, 1975)	11
<u>United States v. Rivera</u> , Doc. No. 74-2115, slip op. 2263 (2d Cir., March 13, 1975)	11, 12
<u>United States v. Rodriguez</u> , 465 F.2d 5 (2d Cir. 1972)	16
<u>United States v. Tavoularis</u> , Doc. No. 75-1027, slip op. 3447 (2d Cir., May 6, 1975)	13
<u>United States v. Taylor</u> , 464 F.2d 240 (2d Cir. 1972)	14

STATUTES CITED

18 U.S.C. §2112	12
18 U.S.C. §2114	10

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QUESTIONS PRESENTED

1. Whether Counts Two and Three, which charged appellant and Fontanez with assaulting Castillo with intent to rob money, must be dismissed because they cannot be sustained under either 18 U.S.C. §2114 or 18 U.S.C. §2112.
2. Whether the District Court's improper charge allowed the jury to find appellant guilty on an erroneous theory of vicarious liability.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Inzer B. Wyatt) rendered on January 28, 1975, after a trial by jury, convicting appellant of assault with intent to rob mail matter, money, or other property of the United States (Count Two) (18 U.S.C. §§2114, 2) by use of a dangerous weapon (Count Three) (18 U.S.C. §§2114, 2), and of assault of a Federal officer (Count Four) (18 U.S.C. §111, 2) and using a deadly and dangerous weapon in the commission of that assault (Count Five) (18 U.S.C. §111, 2). Appellant was sentenced on only Counts Three and Five, to a term of imprisonment of fifteen years and probation for one day on Count Three, and a term of imprisonment of ten years on Count Five, all to run concurrently.

This Court granted leave to appeal in forma pauperis, and The Legal Aid Society, Federal Defender Services Unit, was appointed as counsel on appeal, pursuant to the Criminal Justice Act, by order dated March 24, 1975.

Statement of Facts

On January 16, 1975, an indictment* was filed in the United States District Court for the Southern District of New York charging appellant and Rafael Fontanez with six counts of violating Federal law. The first count charged Fontanez and appellant with conspiracy to murder Jerry Castillo, an undercover agent of the Drug Enforcement Administration (18 U.S.C. §§117, 1114, 1111). Count Two charged Fontanez and appellant with assaulting Castillo with intent to rob money of the United States in his custody (18 U.S.C. §§2114, 2). Count Three charged the use of a dangerous weapon, a .38-caliber revolver, in attempting the assault charged in Count Two (18 U.S.C. §§2114, 2). The fourth count charged the assault of Jerry Castillo, a Federal officer (18 U.S.C. §§111, 1114, 2). Count Five charged the use of a dangerous weapon in the commission of the assault charged in Count Four (18 U.S.C. §§111, 2). Count Six charged the use and carrying of a firearm during the commission of the felony charged in Count One (18 U.S.C. §924(c)(1), 924(c)(2), 924(a)).**

*The indictment is "B" to appellant's separate appendix.

**Fontanez was also charged with receiving a firearm while under indictment (18 U.S.C. §§922(h)(1), 924(a)) (Count Seven).

On January 27, 1974, an examination, pursuant to 18 U.S.C. §4244, was held to determine Fontanez' competence to stand trial. A report (the "Orenstein Report") filed prior to that hearing revealed that Fontanez had a psychiatric condition which had been treated at the military hospital at Fort McLennon, Alabama, and at various Veterans' Administration hospitals, at least through 1974.* His illness was manifested by depression, confusion, and disorientation.** As a result of this filed report and hearing, Fontanez was found mentally incompetent to stand trial or to aid in his own defense.*** Because of Fontanez' incompetence, appellant was tried alone.

A. The Trial

The Government's case was presented largely through the testimony of Jerry Castillo. He testified that on October 17, 1974, he and Special Agent Cordero were in the Chateau Bar in Brooklyn to arrange for a narcotics transaction (10****). Also present in the bar was an informant, Medalia LeBrun (10).

*The Orenstein Report is Document # to the Record on Appeal.

**The Orenstein Report.

***Document #2 to the Record on Appeal.

****Numerals in parentheses refer to pages in the transcript of the trial.

A meeting had been arranged by LeBrun to introduce the Government's agents to an unnamed heroin dealer (31). When this dealer did not arrive, LeBrun introduced Castillo to Fontanez instead. Fontanez agreed to obtain narcotics for the agents within one and a half hours (11). Fontanez did not mention appellant's name, nor was appellant in the bar (32). Since the Government agents did not want to wait one and a half hours, arrangements were made by Cordero and Castillo to buy heroin and cocaine from Fontanez at a later date (11-12). Telephone numbers were exchanged (12).

The next day Castillo met Fontanez at 6:30 p.m. on the corner of 163rd Street and the Grand Concourse in the Bronx to purchase drugs (14). Castillo possessed \$14,000 in government funds in a brown paper bag in the trunk of his car for the buy (15). Castillo, in his car, drove Fontanez to 165th and College Streets in the Bronx, where Fontanez left the car and went into a grocery store to make a telephone call (16-17). Fontanez returned to the car and was shown the money in the trunk (18). Fontanez then drove the car to 196th Street and Colonial Avenue in the Bronx (19).

Fontanez left the vehicle (20). Before leaving, he stated that his source of supply would not want to meet Castillo (48). Fontanez entered 2135 Colonial Avenue, an apartment house nearby. Approximately five minutes later, Castillo saw Fontanez, with a brown paper bag in his hand, and appellant walking toward his car (21). This was the first

time Castillo saw appellant (55). Fontanez, outside appellant's hearing (57), told Castillo that he had the stuff (21). Castillo opened the door on the driver's side to let Fontanez into the automobile (21). At that point, Fontanez pointed a gun at Castillo and told him to let appellant into the back seat (21). Appellant then got into the back seat (22). Fontanez, now in the car, told Castillo he was either going to shoot him or kill him (65).

Fontanez told Castillo to put his hands behind his back (22), which Castillo did. Appellant held Castillo's wrists (149). Fontanez then told appellant to handcuff Castillo (23). Appellant let Castillo's wrists go (23), and Castillo escaped from the car (24). By now Castillo's surveillance team, guns drawn, had surrounded the vehicle.

Appellant was arrested by the surveillance team and told to "spread eagle" on the ground. Drug Enforcement Administration Agent O'Connor testified that he searched appellant and found a pair of handcuffs lying over appellant's trousers (85).

Appellant testified in his own behalf. He testified that he had visited a friend, Jose Net, who lived at 2135 Colonial Avenue, and that they were going to have dinner together (147). There appellant met Fontanez for the first time (145). Appellant further testified that he had never spoken to Fontanez prior to this occasion (146). In need of transportation back to his residence at 22 East 105th Street, appellant accepted Fontanez' offer of a ride (147). Appellant also stated that

on the date of the crime he did not possess the handcuffs allegedly found on him (147), and denied that any police officers took any handcuffs from him (147). Moreover, he stated that before the date of the incident he had never seen the gun used nor the brown paper bag carried by Fontanez (146). Appellant further testified that he never possessed these things (146), nor did he have an "arrangement" with Fontanez regarding Castillo (150). Appellant stated that he grabbed Castillo's wrists because Fontanez told him to and because appellant was scared (149), but that he immediately let go when Fontanez made a statement about harming Castillo (149).

At the end of the presentation of the testimony, and before summation, defense counsel moved to dismiss all counts of the indictment, on the ground that the Government had failed to prove its case beyond a reasonable doubt (159). The Court granted a judgment of acquittal as to Counts One and Six (160).

B. The Charge to the Jury*

The theory of the Government's case was that appellant aided and abetted Fontanez' acts in assaulting Castillo with intent to **steal** the Government money in Castillo's custody. As the Court stated:

*The complete charge is "C" to appellant's separate appendix.

The issue for you [the jury] is whether Rivera, who was not charged by the Government with the actual robbing or attempting to rob or assaulting of Castillo, or with the use of a gun in commission of these offenses, is guilty of these offenses nonetheless as an aider and abetter. The Government contends that he is guilty because he aided and abetted Fontanez in the commission of those offenses charged.

(199).

The operative language in the Court's charge is the following:

In this instance Fontanez is the principal, and the defendant Rivera is charged in the indictment under the aiding and abetting law, which I just read. In order to find that the defendant Rivera aided and abetted Fontanez to commit the offenses charged in these four counts, you must find that the defendant Rivera in some way associated himself with the criminal venture; that he participated in it as something that he wished to bring about; that he, by his act or acts, endeavored to make it succeed.

In determining this question you may consider whether the defendant Rivera had joined with Fontanez in a criminal venture, a plan, a partnership, to rob or to kill or to assault. This participation by the defendant Rivera may be shown by any act designed to promote or further the criminal venture, even of relatively slight importance, which you find was committed by the defendant Rivera.

(200-201). Emphasis added.

After approximately one and one-half hours of deliberation, the jurors asked for a re-reading of Castillo's testimony concerning the time when Fontanez returned to the automobile with Rivera (212). They also desired instructions on the definitions of "reasonable doubt" (312) and "aiding and abetting"

(214). The Court repeated in substance the instructions already given to the jury on these legal issues: "reasonable doubt" (213-214) and "aiding and abetting" (214-216).

After deliberation, the jury found appellant guilty of Counts Two, Three, Four, and Five (217-218).*

*Sentence was not imposed on Counts Two and Four.

ARGUMENT

Point I

COUNTS TWO AND THREE, WHICH CHARGED APPELLANT AND FONTANEZ WITH ASSAULTING CASTILLO WITH INTENT TO STEAL MONEY, MUST BE DISMISSED BECAUSE THEY CANNOT BE SUSTAINED UNDER EITHER 18 U.S.C. §2114 or 18 U.S.C. §2112.

A. The Conviction Under §2114

Appellant was charged under 18 U.S.C. §2114* with an assault with intent to rob Castillo. The Government's proof showed that Castillo was a Drug Enforcement Administration agent, and the prosecution's theory was that appellant aided and abetted Fontanez in his plan to assault and rob Castillo during the course of Fontanez' sale of drugs to Castillo.

It is obvious that the evidence in this case shows no connection between the acts of appellant or Fontanez and the Postal Service. Accordingly, appellant's conviction on Counts Two and Three, premised on alleged violations of 18 U.S.C.

*18 U.S.C. §2114 provides, in pertinent part:

Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if, in effecting or attempting to effect such robbery he ... puts his [the individual having lawful possession of the United States property] life in jeopardy by use of a dangerous weapon, shall be imprisoned twenty-five years.

§2114, must be reversed. United States v. Reid et al., Doc. No. 74-2598/2599, slip op. 3073, 3077 (2d Cir., April 24, 1975); United States v. Rivera, Doc. No. 74-2115, slip op. 2263, 2286 (2d Cir., March 13, 1975).

At a minimum, appellant's sentence on Count Three must be vacated and the cause remanded for resentencing on that count under §2112. See United States v. Rivera, *supra*, slip op. at 2287. At the time of sentence, the Assistant United States Attorney and the District Court agreed that the maximum penalty of imprisonment for twenty-five years under §2114 was an important consideration in determining appellant's sentence and the seriousness of the crime.* In light of the fact that the District Judge considered the twenty-five year maximum penalty under §2114 as a factor in deciding to impose a fifteen-year sentence, the case should be remanded to the District Court for reconsideration of the sentence, since §2112 imposes a less severe maximum sentence.

*The Assistant United States Attorney stated that the maximum twenty-five year penalty is "an indication of the seriousness of the offense and the seriousness with which Congress views it" (228). The Court replied: "There is no question about the seriousness of the offense" (228-229).

B. The Government failed to prove that
appellant aided and abetted an attempted
robbery of Castillo under 18 U.S.C. §2112.*

Under United States v. Rivera, supra, slip op. at 2287, this Court held that charges improperly premised on 18 U.S.C. §2114 can, in some cases, be treated as if they had been brought under 18 U.S.C. §2112, and convictions, although not sentences, can be sustained on this theory. However, in this case such an analysis will not suffice to permit an affirmation of appellant's conviction on the charges involving the attempted robbery of Castillo (Counts Two and Three).

In order to establish appellant's guilt on a theory that he was involved in a robbery or plans for one, the Government had to show appellant's knowledge of or participation in Fontanez' arrangement for a sale of narcotics to undercover Drug Enforcement Administration agent Castillo on October 18, 1974. This is so because, on the facts of this case, the only way a robbery could have been part of the scheme was either as a sale of bogus drugs or a taking of the money to be used to pay for the drugs.

*18 U.S.C. §2112 provides:

Whoever robs another of any kind or description of personal property belonging to the United States shall be imprisoned not more than fifteen years.

However, the proof showed that Castillo was introduced to Fontanez in a bar in Brooklyn on October 17, 1974, and that arrangements were made in the bar by Cordero and Castillo to buy narcotics from Fontanez at a later date. The next day Fontanez met Castillo in the Bronx, and they proceeded to 196th Street and Colonial Avenue in Brooklyn, the intended location of the sale.

It is at this point that appellant appears for the first time. According to the evidence, appellant accompanied Fontanez back to Castillo's parked car and, at Fontanez' command, held Castillo's wrists. There was also strenuously disputed evidence that appellant possessed handcuffs. There is no indication why appellant became involved, since there is no proof that appellant was present when, or knew about, the negotiations for the narcotics which had occurred earlier, either in the bar in Brooklyn or in telephone communications between Fontanez and the Drug Enforcement Administration agents (16-17). Even when Fontanez returned to Castillo's vehicle, there is no proof that appellant heard the conversations between Fontanez and Castillo about the packet Fontanez had for Castillo (57-58).

Here, whatever other crime might have been committed (United States v. Tavoularis, Doc. No. 75-1027, slip op. 3447, 3462 (2d Cir., May 6, 1975)) there is no evidence to indicate that appellant knew of the planned narcotics transaction or the money involved, or that he joined with Fontanez in a cri-

minal venture to rob. See United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938). Taking the evidence most favorable to the Government (Glasser v. United States, 315 U.S. 60, 80 (1942)), the jury could have concluded only that appellant aided and abetted the assault of Castillo -- crimes charged in two other counts in the indictment. United States v. Taylor, 464 F.2d 240, 243 (2d Cir. 1972).

Point II

THE DISTRICT COURT'S CHARGE IMPROPERLY ALLOWED THE JURY TO FIND APPELLANT GUILTY ON AN ERRONEOUS THEORY OF VICARIOUS LIABILITY.

The District Court charged the jurors that they could find appellant guilty on all counts of the indictment (assault of a Federal officer and assault with intent to rob) as an aider and abetter of Fontanez. The Court stated:

In order to find that the defendant Rivera aided and abetted Fontanez to commit the offenses charged in these four counts, you must find that the defendant Rivera in some way associated himself with the criminal venture; that he participated in it as something he wished to bring about; that he, by his act or acts endeavored to make it succeed.

In determining this question you may consider whether the defendant Rivera had joined with Fontanez in a criminal venture, a plan, a partnership, to rob or to kill or to assault.

(200-201).

It is evident that, after deliberating, the jurors focused on this aspect of the case, for they asked for further instructions on aiding and abetting. The Court repeated, in substance, its earlier instructions (216).

The charge given was incorrect, since it permitted the jury to render a guilty verdict on alternative theories of criminal liability which did not require a finding of robbery, an attempt to rob, or an intent to rob, any one of which was

required for conviction under 18 U.S.C. §2114 or §2112.

In order to convict appellant as an aider and abetter, the jurors should have been required to find that appellant joined in a specific criminal venture (United States v. Gal-lishaw, 428 F.2d 760, 763 (2d Cir. 1970); United States v. Howell, 447 F.2d 1114, 1117 (2d Cir. 1971); United States v. Dickerson, 508 F.2d 1216, 1218 (2d Cir. 1975)), which included assault as well as an intent or attempt to rob, or a robbery, for these elements are not established by proof of assault alone. Cf., United States v. Dickerson, supra, 508 F.2d at 1218-1219.

Since the charge improperly permitted a conviction based on the alternative theories of aiding and abetting an assault or homicide, as well as robbery, the charge, taken as a whole, permitted a conviction without a finding of all the elements of the crime. Accordingly, reversal is required.* United States v. Rodriguez, 465 F.2d 5, 10 (2d Cir. 1972); Leary v. United States, 395 U.S. 6, 31-32 (1969).

*Further indication of the error in the charge is that it permitted the jurors to find appellant guilty of the charges of assault with intent to rob on exactly the same proof as was required to establish guilt on Counts Three and Four, the assault counts.

CONCLUSION

For the foregoing reasons this case must be reversed and remanded to the District Court for re-trial with instructions to dismiss Counts Two and Three and to vacate the sentence heretofore imposed on those counts; in the alternative, the case should be remanded to the District Court for resentencing on Count Three.

Respectfully submitted,

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Certificate of Service

May 16, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Jonathan Silberman